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No. 97-1922

In the Supreme Court of the United States

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,
PETITIONER

v.

FEDERAL RAILROAD ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of the Federal Railroad Administration that petitioner is a "railroad carrier" within the meaning of 49 U.S.C. 20102.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A4-A6) is unpublished, but the decision is noted at 132 F.3d 1482 (Table). The decision of the Federal Railroad Administration (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1997. A petition for rehearing was denied on February 27, 1998. Pet. App. A7. The petition for a writ of certiorari was filed on May 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Federal Railroad Safety Act of 1970 (Safety Act), Congress directed the Secretary of Transportation to assume regulatory authority over "all areas of railroad safety." Safety Act, Pub. L. No. 91-458, § 202(a), 84 Stat. 971. The Safety Act authorized the Secretary to issue regulations supplementing the safety laws already in effect and granted the Secretary broad inspection, injunctive, and penalty powers. *Id.*, §§ 202(a), 208-210, 84 Stat. 971, 974-976. The Secretary has delegated many of those powers to the Federal Railroad Administration (FRA), a subagency of the Department of Transportation.

In 1982, Congress amended the Safety Act to provide that the term "all areas of railroad safety" includes "the safety of commuter or other short-haul rail passenger service in a metropolitan or suburban area, including any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979." Rail Safety and Service Improvement Act of 1982 (1982 Act), Pub. L. No. 97-468, § 702(c), 96 Stat. 2580. In a separate context, Congress contemporaneously defined "[c]ommuter service" as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." Northeast Rail Service Act of 1981 (NERSA), *enacted as* Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1135(a)(4), 95 Stat. 646 (codified at 45 U.S.C. 1104(4)). In that legislation, Congress specifically named "the Port

Authority Trans-Hudson Corporation"—the petitioner in this case—as a "[c]ommuter authority." *Id.*, § 1135(a)(3), 95 Stat. 646 (codified at 45 U.S.C. 1104(3)).

In the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 7(a), 102 Stat. 628, Congress clarified that, for purposes of the Secretary's regulatory authority over "every area of railroad safety," 49 U.S.C. 20103, the term "railroad" means "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways," including "commuter or other short-haul railroad service in a metropolitan or suburban area" and "high speed ground transportation systems that connect metropolitan areas." 49 U.S.C. 20102(1)(A).[1] Congress further provided, however, that the term "does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation." *Ibid.*; see also 49 C.F.R. 223.3(b)(2).

2. Petitioner, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, operates a transportation system connecting New York City to northern New Jersey. Petitioner carries 199,000 passengers each day between those two locations. C.A. App. 13, 36. Since its formation in 1962, petitioner has been subject to federal railroad safety laws. In a November 1995 letter, however, petitioner asked the FRA to recognize it "as being an inter-urban rapid transit system not subject to FRA railroad regulations." *Id.* at 68-69. Petitioner based

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[1] In 1994, Congress recodified the federal railroad safety statutes and placed them in Title 49 of the United States Code. That recodification made no substantive change to those statutes. See Act of July 5, 1994, Pub. L. No. 103-272, § 1, 108 Stat. 745; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993).

that request largely on the contention that it ran its operations on a "closed system" with no remaining connections to other railroads. *Id.* at 13-14, 37-38.

The FRA denied petitioner's request in a December 1996 letter. Pet. App. A1-A3. The FRA first observed that, in a 1985 rulemaking proceeding in which petitioner had declined to submit comments, the agency had determined that its safety jurisdiction extended to petitioner's operations. *Id.* at A2. The agency thus looked to see whether "there has been any factually significant change in circumstances on [petitioner's] system." *Ibid.* It found that petitioner has "some physical and operating characteristics" similar to those found in rapid rail transit systems. *Ibid.* Nonetheless, in a specific waiver request filed contemporaneously with petitioner's request for this jurisdictional ruling, petitioner itself had reaffirmed that it "serves primarily short-haul commuters." *Ibid.* The FRA concluded that, "in light of the nature of [its] operations," petitioner's operations remain within Section 20102's definition of "railroad," which specifically includes " 'commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979.' " *Id.* at A2-A3 (quoting 49 U.S.C. 20102(1)(A)(i)). For that reason, the agency found, petitioner "is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." *Id.* at A3.

3. In an unpublished memorandum opinion, the court of appeals unanimously affirmed. Pet. App. A4-A6. The court found that petitioner "shares characteristics of both 'rapid transit operations' and 'commuter or other short-haul railroad passenger

service,'" and that "the proper classification of [petitioner] is ambiguous." *Id.* at A6. In those circumstances, the court concluded, the FRA acted reasonably in finding that petitioner "is a commuter service and therefore is 'among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction.'" *Ibid.*

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner argues that its operations should be classified as "rapid transit operations," which are not subject to the FRA's safety jurisdiction, rather than as "commuter or other short-haul railroad passenger service," which is subject to that jurisdiction. See 49 U.S.C. 20102. That factbound claim is without merit. Even though petitioner's operations do present "a somewhat unique case" (Pet. App. A2), petitioner continues to serve, by its own admission, "primarily short-haul commuters." *Ibid.* That admission forecloses petitioner's claim here, because Section 20102 places commuter services squarely within the scope of the FRA's jurisdiction. Indeed, such services fall within that jurisdiction whether or not the facilities in question are "connected to the general railroad system of transportation," 49 U.S.C. 20102(1)(B), despite petitioner's apparent assumption to the contrary (Pet. 9). Whether or not facilities are connected to the general railroad system is relevant only for determining whether services that *are* properly characterized as "rapid transit operations"

(as these are not) nonetheless fall within the FRA's jurisdiction.

Petitioner argues (Pet. 11) that reliance on the commuter-oriented character of its operations "proves too much" because many "rapid transit systems" carry commuters as well. Before the agency, however, petitioner acknowledged not just that it carries short-haul commuters, but that such carriage is its "primar[y]" function. Pet. App. A2. That concession is critical. Unlike the New York City subway system and other rapid transit systems, petitioner does not generally transport non-commuting passengers between points within a single urban area; instead, petitioner's overriding purpose is to transport commuters between New York City and New Jersey. See C.A. App. 36, 45.[2] Also unavailing is petitioner's claim (Pet. 12) that it does not have some of the characteristics that NERSA identifies as "usually" associated with "commuter services." See pp. 2-3, *supra* (discussing NERSA). Petitioner does not deny having other characteristics that NERSA does identify with such services, such as "morning and evening peak period operations." 45 U.S.C. 1104(4). Indeed, NERSA itself identifies petitioner *by name* as a "[c]ommuter authority." 45 U.S.C. 1104(3).

There is also no merit to petitioner's argument (Pet. 6, 10) that the decision below conflicts "in principle" with *Chicago Transit Authority* v. *Flohr*, 570 F.2d 1305 (7th Cir. 1977). That decision held that the

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[2] Moreover, petitioner provides no basis for the contention that "many" urban rapid transit systems outside the FRA's jurisdiction "carry 'commuters' as the *bulk* of their customers." Pet. 11 (emphasis added). In particular, as characterized by petitioner itself, the study group findings on which petitioner relies (see Pet. 11 n.4) do not support that proposition.

FRA's jurisdiction does not extend to "rapid transit operations," an issue not presented or disputed here. In subsequent legislation, Congress responded to *Flohr* by providing that the FRA's safety jurisdiction over "railroads" extends to "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," 1982 Act, § 702(c), 96 Stat. 2580; see H. R. Rep. No. 571, 97th Cong., 2d Sess. 41 (1982), but does not extend to "rapid transit operations in an urban area that are not connected to the general railroad system of transportation," 49 U.S.C. 20102(1)(B). In part because *Flohr* predated that legislation, it does not address how to draw the distinction between those two statutory categories. In any event, even apart from those intervening changes in law, the *Flohr* court's determination that the Chicago system is a "rapid transit system" beyond the FRA's jurisdiction does not support the proposition that the quite different system at issue here falls within such a category as well. Indeed, NERSA's identification of petitioner as a "[c]ommuter authority" (45 U.S.C. 1104(3)) suggests precisely the opposite conclusion.

2. Petitioner also claims that the FRA's December 1996 letter violates the requirement, derived from the Administrative Procedure Act, 5 U.S.C. 706, "that [an] agency adequately explain its result." Pet. 6. The court of appeals did not address that claim, presumably because petitioner did not clearly develop it in that court; instead, petitioner argued principally that the FRA's decision was substantively invalid and unsupported by the factual record. See, *e.g.*, Port Auth. C.A. Br. 6-14. But even if petitioner had adequately preserved the claim, the FRA did in fact meet

its obligation to provide a reasoned explanation for its decision.

As the FRA observed in its December 1996 letter, it has long treated petitioner as a commuter carrier subject to federal safety regulation, a status reaffirmed in a 1985 rulemaking proceeding in which petitioner declined to submit comments. Pet. App. A2. The agency further noted that, despite certain mechanical changes in petitioner's operations, petitioner itself has conceded that it continues to "serve[] primarily short-haul commuters." *Ibid.* As discussed, that observation alone justifies the FRA's decision because, the agency emphasized, federal safety jurisdiction under Section 20102 "applies to, among others, 'commuter or other short-haul railroad passenger service in a metropolitan or suburban area.'" Pet. App. A2-A3.

Although "[d]ivergence from agency precedent demands an explanation," when an agency is merely applying prior agency policy in a consistent manner, "the agency's explanation need not be elaborate." *Hall* v. *McLaughlin*, 864 F.2d 868, 872-873 (D.C. Cir. 1989). Moreover, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The FRA's letter here—reaffirming the agency's long-standing exercise of jurisdiction over operations that, by petitioner's own concession, remain commuter-oriented—amply meets those standards.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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